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No. 80-1057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE 400 CONDOMINIUM ASSOCIATION, and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as trustee under Trust 17460,

Petitioners,

v.

THOMAS M. TULLY, Cook County Assessor, STANLEY T. KUSPER, JR., Cook County Clerk, EDWARD J. ROSEWELL, Cook County Treasurer, and SEYMOUR ZABAN and HARRY H. SEMROW, Members of the Cook County Board of Appeals,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether attorney's fees may be awarded pursuant to 42 U.S.C. §1988 when the underlying case was not filed pursuant to the Civil Rights Act and, in affording relief in the underlying case, no federally protected right was enforced, plaintiff having failed to allege the violation of a substantial federally protected right.

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STATEMENT OF THE CASE

Petitioner's recitation of the case is substantially correct with the following additions: Petitioner, in bringing its underlying case did not argue any substantial federal issue, although plaintiff did attempt to plead and brief an alleged equal protection violation. Rather, the state appellate court permitted an injunction against the tax because it did not comply with the Illinois Condominium Act. The court held that the tax should not have been assessed against the garage as one taxable unit, but should have been assessed pro rata against each unit owner. Even if the tax had been sustained there would not have been a double taxation problem.

REASON FOR DENYING WRIT

ATTORNEY'S FEES UNDER 42 U.S.C. §1988 WERE PROPERLY DENIED BECAUSE THE UNDERLYING CASE WAS NOT FILED PURSUANT TO THE CIVIL RIGHTS ACT, AND NO SUBSTANTIAL FEDERALLY PROTECTED RIGHT WAS INVOKED OR ENFORCED.

It is unequivocally clear that Illinois courts will hear federal civil rights cases brought, in particular, pursuant to 42 U.S.C. §1983. *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295, 323 N.E.2d 110, 113-114 (1st Dist. 1974); *Bohacs v. Reid*, 63 Ill. App. 3d 477, 481-82, 379 N.E.2d 1372, 1375 (2nd Dist. 1978). In fact, the Illinois Appellate Court in *Alberty* expressly rejected *Chamberlain v. Brown*, 442 S.W. 2d 248 (Tenn. 1969) the only case, so far as we can find, which has refused to acknowledge concurrent state court jurisdiction of actions premised on the Civil Rights Act.

In the case at bar, however, petitioner did not bring its case pursuant to 42 U.S.C. §1983. *The 400 Condominium Association v. Tully*, 79 Ill. App. 3d 686, 398 N.E.2d 951 (1st Dist. 1979). Petitioner proceeded under state law. Although petitioner made certain allegations of fact in its Complaint attempting to show an alleged equal protection violation, those allegations (Pet. App. D-6 and D-7) did not include federally protected rights. Moreover, plaintiff's allegation of a possible double tax (Pet. App. D-5) was not adopted by the Illinois Appellate Court in light of an uncontradicted affidavit in the record specifically denying the charge. Accordingly, since petitioner failed to allege a substantial federally protected right, failed to proceed under the Civil Rights Act, and since the Illinois Appellate Court did not

enforce a federally protected right, attorney's fees under the Civil Rights Act were properly denied.

Petitioner's "issue" presented at p. 19 of its Petition is not an issue at all in this case. As we have noted, Illinois courts hear Civil Rights cases. Further, petitioner's Petition creates the misleading impression that respondents have taken a position contrary to this well-settled Illinois law. (Pet. pp. 19-26) Petitioner cites our argument below that "42 U.S.C. §1983 . . . does apply to tax cases." However, petitioner omits the two cases which were cited to support the assertion: "See *Lynch v. Household Finance Corp.*, 92 S.Ct. 1113 at 1117 (Fn. 6), and *Czajkowski v. State of Illinois*, 460 F. Supp. 1265 at 1277 (N.D. Ill. 1977)." It is therefore clear that we have consistently maintained that if civil rights jurisdiction does apply to tax cases, then Illinois courts will hear them under *Alberty* and *Bohacs*. See our arguments briefed in *Rosewell v. LaSalle National Bank, Trustee*, U.S. Supreme Court No. 79-1157 (March 24, 1981). Clearly, *Maine v. Thiboutot*, ... U.S. ....., 100 S.Ct. 2502 (1980), has no application to the case at bar.

CONCLUSION

Accordingly, we conclude that attorney's fees under 42 U.S.C. §1988 were properly denied because the underlying case was not filed pursuant to the Civil Rights Act, and no substantial federally protected right was invoked or enforced. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 26, 1981